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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CALIFORNIA CRANE SCHOOL, INC., on behalf of itself and all others similarly situated,

Plaintiff,

v.

GOOGLE LLC, ALPHABET INC., XXVI HOLDINGS INC., APPLE INC., TIM COOK, SUNDAR PICHAI, and ERIC SCHMIDT,

Defendants.

CASE NO. 4:21-cv-10001-HSG

APPLE DEFENDANTS' OPPOSITION TO MOTION FOR LEAVE TO AMEND FIRST AMENDED COMPLAINT

Date: January 19, 2023
Time: 2:00 p.m.
Place: Courtroom 2
Judge: Hon. Haywood S. Gilliam, Jr.

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I. INTRODUCTION

Plaintiff's request for leave to file a second amended complaint should be denied. Not only does the proposed Second Amended Complaint (the "PSAC"), ECF No. 90-2, do nothing to cure the multiple deficiencies that Defendants[1] identified in the First Amended Complaint (which in turn did nothing to cure the deficiencies in the original complaint), but also Plaintiff proposes to add state law claims—all of which could have been included in Plaintiff's original or amended complaint—ostensibly for purposes of seeking "public injunctive relief," despite the fact that this Court has already said such relief is not available here. *See* Pl's. Mem. in Support of Mot. for Leave to Amend (the "Motion" or "Motion for Leave to Amend"), ECF No. 90-1. The filing of the PSAC would unduly delay these proceedings and no doubt prejudice the Apple Defendants by requiring them to brief Plaintiff's failure to state a claim for a third time. In any event, amendment would be futile because (1) Plaintiff's theory of "public injunctive relief" remains inherently flawed; (2) Plaintiff's proposed Cartwright Act, Unfair Competition Law ("UCL"), and Unjust Enrichment claims are all independently deficient, including because they are predicated on Plaintiff's deficient federal law claims; and (3) this Court may decline to exercise supplemental jurisdiction over Plaintiff's UCL and Unjust Enrichment claims, given the shortcomings of Plaintiff's other claims. The Court should therefore reject Plaintiff's effort to burden it and the Apple Defendants with yet another insufficient pleading.

II. BACKGROUND

Plaintiff's action has been defective from its inception nine months ago. Plaintiff commenced this action on December 27, 2021, and its original complaint raised only federal law claims—one claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, and one claim under Section 2 of the Sherman Act, 15 U.S.C. § 2. Compl. ¶¶ 135–52, ECF No. 1. Pursuant to those federal law claims, the original complaint sought both treble damages and injunctive relief in the form of billions of dollars of disgorgement and divestiture on behalf of a putative class of millions of search advertisers.

[1] Defendants are Google LLC, Alphabet Inc., XXVI Holdings Inc., Apple Inc., Tim Cook, Sundar Pichai, and Eric Schmidt. Defendants Google LLC, Alphabet Inc., XXVI Holdings Inc., Sundar Pichai, and Eric Schmidt collectively are referred to herein as "Google," or the "Google Defendants," unless otherwise noted. Defendants Apple Inc. ("Apple") and Tim Cook are together referred to herein as the "Apple Defendants," unless otherwise noted.

Id. ¶¶ 66, 156. On March 18, 2022, Defendants filed a Motion to Dismiss, identifying numerous reasons for this Court to dismiss Plaintiff's Sherman Act claims in their entirety, including that Plaintiff: (1) did not allege a plausible horizontal conspiracy; (2) did not identify a facially sustainable relevant market; (3) failed to allege that the Apple Defendants specifically intended to monopolize, or for Google to monopolize, any relevant market; and (4) lacked antitrust standing. ECF No. 33 at 6–20. The same day, the Google Defendants filed a Motion to Compel Arbitration, which explained that Plaintiff signed an agreement to individually "arbitrate all disputes and claims . . . that arise out of or relate in any way to" its participation in Google's advertising programs and services. ECF No. 32 at 2 (internal quotation marks omitted). The Apple Defendants also filed a corresponding Motion to Stay Pending Arbitration. ECF No. 34.

On March 29, 2022, while these motions were pending, Plaintiff filed its First Amended Complaint (the "FAC"). ECF No. 39. Like the original complaint, the FAC raised only federal law claims (i.e., the same antitrust claims under Sections 1 and 2 of the Sherman Act). *Id.* ¶¶ 135–57. Plaintiff's limited amendments made no effort to cure the pleading defects; the only change of note was Plaintiff's attempt to label its requests for disgorgement and divestiture as so-called "public injunctive relief," *id.* ¶ 162, evidently in an effort to invoke the *McGill* rule as a means to evade the arbitration agreement it signed (and the Google Defendants' Motion to Compel Arbitration, *see* ECF No. 43 at 2–3). In their April 8, 2022 Reply in Support of their Motion to Compel Arbitration, the Google Defendants explained, *inter alia*, that federal law does not authorize private antitrust suits for public injunctive relief and that, in any event, the FAC did not actually seek public injunctive relief. ECF No. 48 at 2–6. In their Reply in Support of their Motion to Stay Pending Arbitration, the Apple Defendants likewise noted that Plaintiff may not seek public injunctive relief. ECF No. 50 at 3. In view of the FAC's deficiencies, Defendants filed a second motion to dismiss (the "Motion to Dismiss the FAC") on April 12, 2022, raising all the same arguments they raised in their previous Motion to Dismiss, explaining once more that Plaintiff could not seek public injunctive relief, and requesting a September 29, 2022 hearing date.[2] ECF No. 51 at 7–21, 25.

[2] On September 20, 2022, this Court continued the hearing on the Apple Defendants' Motion to Dismiss until October 18, 2022. ECF No. 94.

This Court held argument on the Google Defendants' Motion to Compel Arbitration on August 11, 2022, following *numerous* additional filings by Plaintiff directed at its request for public injunctive relief and/or the Google Defendants' Motion to Compel Arbitration.[3] During the argument, the Court observed that Plaintiff could likely not seek public injunctive relief under federal law and asked Plaintiff whether it was aware of any cases in which a court permitted a plaintiff to seek such relief under federal law. Transcript of Proceedings Held on August 11, 2022 ("Tr.") 4:14–5:1, 8:1–8:10, ECF No. 93. Plaintiff acknowledged it was aware of no such cases and for the first time suggested it could remedy the issue by amending its complaint again to add a Cartwright Act claim. Tr. 8:11–9:4. Despite the Court's request for a justification as to why Plaintiff failed to bring such a claim in the first instance, Plaintiff could provide none, noting only that it "didn't think it was necessary at the time" to do so. Tr. 9:5–9.

The Court granted the Google Defendants' Motion to Compel Arbitration the following day and stayed all claims against the Google Defendants. ECF No. 86. In granting that motion, the Court provided three overarching reasons for rejecting Plaintiff's theory of public injunctive relief. *Id.* at 6–8. First, because public injunctive relief "is a creature of California law," Plaintiff's federal law claims do not authorize such relief. *Id.* at 6–7 (internal quotation marks omitted). Second, any amendment to add a Cartwright Act claim would be futile because "no court has interpreted the Cartwright Act . . . to authorize the distinct kind of public injunctive relief" Plaintiff seeks. *Id.* at 7. And third, even if Plaintiff could bring a claim that authorized public injunctive relief, its specific claims are "paradigmatic 'representative claims'" for which public injunctive relief is not available. *Id.* at 8.

Notwithstanding the Court's decision granting the Google Defendants' Motion to Compel Arbitration, on September 9, 2022—almost one month after the Court's decision and at that time less than three weeks from oral argument on the Apple Defendants' pending Motion to Dismiss the FAC—Plaintiff filed the instant Motion, seeking leave to amend the FAC to add purportedly

[3] These filings included: (1) an "Objection" to the Google Defendants' Motion to Compel, ECF No. 53; (2) a Motion for an Order to Show Cause as to why the Google Defendants' Motion to Compel Arbitration was not rendered moot by the FAC, ECF Nos. 66; (3) a Reply in Support of the Motion for an Order to Show Cause, ECF No. 78; and (4) a Sur-Reply in Opposition to the Google Defendants' Motion to Compel Arbitration, ECF No. 81.

"necessary language and supporting California causes of action" that would permit public injunctive relief. Mot. 6. The PSAC adds a putative class action claim under the Cartwright Act and purports to raise claims for "himself" and "for the general public" under the UCL and for Unjust Enrichment. PSAC ¶¶ 160–89. However, like the amendments in the FAC, the amendments in the PSAC do nothing to cure the pleading failures identified in the Apple Defendants' Motion to Dismiss. Plaintiff expressly acknowledges that "[t]he underlying facts alleged . . . have not changed." Mot. 5.

III. ARGUMENT

Plaintiff's request to amend the FAC to pursue a deficient legal theory—one it has been aware of for months—is entirely without merit and should be rejected. While Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend "shall be freely given when justice so requires," leave to amend "is not granted automatically." *Tindle v. City of Daly City*, 2016 WL 3198619, at *1 (N.D. Cal. June 9, 2016) (Gilliam, J.) (internal quotation marks omitted). "[L]ate amendments to assert new theories are not reviewed favorably," especially where, as here, "the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *S.F. Herring Ass'n v. U.S. Dep't of the Interior*, 946 F.3d 564, 582 (9th Cir. 2019) (quoting *Royal Ins. Co. of Am. v. Sw. Marine*, 194 F.3d 1009, 1016–17 (9th Cir. 1999)). And a district court's "discretion to deny leave to amend is particularly broad where," as here, "the plaintiff has previously amended the complaint." *Id.* (quoting *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)). Courts generally weigh five factors in determining whether leave to amend is warranted, including: (1) undue delay, (2) prejudice to the opposing party, (3) futility of amendment, (4) whether the plaintiff has previously amended its complaint, and (5) bad faith. *Davis v. Pinterest, Inc.*, 2020 WL 6342936, at *2 (N.D. Cal. Oct. 29, 2020) (Gilliam, J.). Here, these factors conclusively weigh against allowing leave to amend.

A. Plaintiff Unduly Delayed in Seeking Leave to Amend

Denial of leave to amend is warranted because Plaintiff unduly delayed in attempting to raise the theories it now seeks to assert, and allowing amendment would only create further delay. The "undue delay" factor takes into account whether "the moving party knew or should have known the facts and theories raised by the amendment in the original pleading," *AmerisourceBergen Corp. v.*

Dialysist W., Inc., 465 F.3d 946, 953 (9th Cir. 2006) (internal quotation marks omitted), and denial of leave to amend is proper where a plaintiff "present[s] no new facts but only 'new theories' and 'provide[s] no satisfactory explanation for his failure to fully develop his contentions originally,'" *Allen*, 911 F.2d at 374 (quoting *Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 570–71 (9th Cir. 1987)).

Here, Plaintiff concedes that all of its new state law causes of action in the PSAC are based on the same facts as its original causes of action under the Sherman Act. Mot. 5. Plaintiff thus acknowledges that it knew of the facts underlying its proposed state law causes of action from the inception of this litigation in December 2021—nine months ago. In such circumstances, courts regularly find undue delay and deny leave to amend. *See, e.g.*, *Hawthorne v. Yanez*, 2021 WL 5998397, at *1 (N.D. Cal. Dec. 20, 2021) (Gilliam, J.) (denying leave due to unexplained delay of "over a year"); *Utterkar v. Ebix, Inc.*, 2015 WL 5027986, at *7 (N.D. Cal. Aug. 25, 2015) (denying leave where the plaintiff knew of the facts underlying the causes of action for over ten months but offered no explanation for why the new causes of action were not brought earlier). Indeed, the Ninth Circuit has held that an unexplained delay of eight months may constitute undue delay. *See Jackson v. Bank of Haw.*, 902 F.2d 1385, 1388 (9th Cir. 1990). And a finding of undue delay is particularly appropriate where, as here, a plaintiff had "ample opportunity to allege" new claims but "failed to provide any reasonable justification for not bringing" them in the first instance "in [its] initial complaint or [its] first amended complaint." *Davis*, 2020 WL 6342936, at *2.

Plaintiff had no explanation for omitting state law claims from its prior pleadings when asked by the Court. Tr. 9:5–9. Now, Plaintiff asserts that the need for the state law claims "did not become clear until the Court issued its order granting the motion to compel arbitration on August 12, 2022." Mot. 4. But that makes no sense given the clear case law holding that a plaintiff "may not seek public injunctive relief under the Sherman Act." *In re Google Digit. Advert. Antitrust Litig.*, 2021 WL 2021990, at *7 (N.D. Cal. May 13, 2021); *see also, e.g.*, *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 919 (N.D. Cal. 2020) ("The public injunction is a creature of California law . . . ."). Indeed, Defendants pointed that out (in addition to identifying many other deficiencies in Plaintiff's original complaint and FAC) in their briefing on the Motions to Dismiss, to Compel Arbitration, and to Stay

Pending Arbitration *months* before this Court issued its order granting the Google Defendants' Motion to Compel Arbitration. *See* ECF Nos. 48, 50–51.

In any event, as Plaintiff's new state law claims are futile in light of Plaintiff's flawed theory of "public injunctive relief" and inability to meet basic pleading standards, *see infra* Section III.C, permitting amendment would only "further delay" this action by "no doubt prompt[ing] another motion to dismiss." *Alfasigma USA, Inc. v. First Databank, Inc.*, 2021 WL 4459754, at *2 (N.D. Cal. Aug. 11, 2021) (Gilliam, J.) (denying leave where the plaintiff did not "provide any reasonable justification for not bringing this claim in either its initial complaint or first amended complaint"); *Hawthorne*, 2021 WL 5998397, at *1 (concluding that granting leave "would create undue delay" in light of pending "dispositive motions"). For all these reasons, the "undue delay" factor thus weighs strongly in favor of denying leave to amend.

B. The Apple Defendants Would Be Prejudiced by Plaintiff's Further Amendments

Denial of leave to amend is further warranted because the Apple Defendants would be prejudiced by amendment. Courts find prejudice to a party opposing amendment where, *inter alia*, that party shows amendment would cause "expense, delay, and wear and tear on individuals and companies," *Utterkar*, 2015 WL 5027986, at *6 (internal quotation marks omitted), or "unnecessarily increase costs," *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, 2011 WL 3328398, at *2 (E.D. Cal. Aug. 2, 2011). By that logic, courts often find prejudice to a party opposing an amendment where a motion to dismiss is fully briefed and pending. *See e.g.*, *Hawthorne*, 2021 WL 5998397, at *1; *Franczak v. Suntrust Mortg. Inc.*, 2013 WL 4764327, at *4 (N.D. Cal. Sept. 5, 2013); *Lawson v. Ocwen Loan Servicing LLC*, 2011 WL 39009, at *1 (W.D. Wash. Jan. 4, 2011) (finding prejudice where amendment would have "moot[ed] Defendants' pending motion to dismiss"). For example, in *Brown v. Natures Path Foods, Inc.*, on which Plaintiff relies, *see* Mot. 3–5, this Court expressly acknowledged that a defendant "would suffer prejudice by having to respond to a third complaint," where it already filed two motions to dismiss, which "weigh[ed] in favor of denying leave." 2022 WL 3357669, at *2 (N.D. Cal. Aug. 15, 2022) (Gilliam, J.).

Granting Plaintiff leave to amend would similarly prejudice the Apple Defendants, who have already filed two motions to dismiss. This Court is now scheduled to hear argument on the Apple

Defendants' Motion to Dismiss the FAC (which included supplemental briefing at the Court's request) on October 18, 2022. Despite all that briefing and with oral argument fast approaching, Plaintiff "created a situation whereby [the Apple Defendants'] second, fully-briefed motion to dismiss could be rendered moot just at the point when it is ready to be decided." *Franczak*, 2013 WL 4764327, at *4 (finding such tactics both "dilatory and prejudicial"). Given Plaintiff's failure to address the defects identified by Defendants in Plaintiff's Sherman Act claims, and the deficiencies inherent in its new state law claims, *see infra* Section III.C, the proposed amendments would prompt another motion to dismiss. In "requir[ing the Apple Defendants] to incur additional litigation expenses that [they] would not otherwise face" by virtue of further motion practice, the proposed amendments would cause the Apple Defendants prejudice. *Utterkar*, 2015 WL 5027986, at *6. Put simply, the Apple Defendants should not be required to brief the same issues a third time. This factor, too, weighs in favor of denying leave.

C. Plaintiff's Proposed Amendments Would Be Futile

Denial of leave to amend is also warranted because amendment would be futile. "[T]he general rule that parties are allowed to amend their pleadings does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal." *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (internal quotation marks omitted). In fact, futility "can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Plaintiff's unchanged Sherman Act claims would face dismissal for all the reasons set forth in the Motion to Dismiss and the Motion to Dismiss the FAC,[4] *see* ECF Nos. 33, 51, and the newly added state law claims are futile for several reasons: (i) this Court already held that any attempt by Plaintiff to seek public injunctive relief—the principal reason for Plaintiff's amendment, *see* Mot. 4, 8—would be futile; (ii) Plaintiff's new state law claims under the Cartwright Act, the UCL, and the doctrine of Unjust Enrichment are all independently defective;

[4] Plaintiff concedes that the PSAC does not add any factual allegations and that its "underlying theory of the case has not changed." Mot. 5–6. By Plaintiff's own admission, then, the Apple Defendants' arguments demonstrating that dismissal of Plaintiff's Sherman Act claims is warranted remain wholly intact—and, if anything, only further support dismissal with prejudice.

and (iii) if this Court dismisses Plaintiff's Sherman Act and Cartwright Act claims, it may decline to exercise supplemental jurisdiction over Plaintiff's new UCL and Unjust Enrichment claims.

1. Plaintiff's Attempt to Add State Law Claims to Seek Public Injunctive Relief Would be Futile

The Court already explained that it would be futile for Plaintiff to amend the FAC to add state law claims for purposes of seeking public injunctive relief (the principal reason for Plaintiff's amendment here, *see* Mot. 4, 8) in order to avoid—under the *McGill* rule—the arbitration agreement it entered into with Google.[5] *See* ECF No. 86 at 7–8 (citing *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)). "Under that rule, . . . a contractual provision [that] 'purports to waive [a party's] right to request in any forum . . . public injunctive relief . . . is invalid and unenforceable under California law.'" *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 539 (9th Cir. 2021) (some alterations in original) (quoting *McGill*, 2 Cal. 5th at 961). But "public injunctive relief within the meaning of *McGill* is limited to forward-looking injunctions that seek to prevent future violations of law for the benefit of the general public as a whole, as opposed to a particular class of persons." *Id.* at 542. Far from seeking forward-looking relief, Plaintiff's FAC and PSAC pursue class claims seeking substantial damages on behalf of a putative class of millions of search advertisers, PSAC ¶ 135, and Plaintiff now seeks to *add* class claims under the Cartwright Act, *id.* ¶162.

Further, any amendment attempting to seek public injunctive relief would be futile because Plaintiff's specific claims "are paradigmatic 'representative claims' that would primarily benefit a discrete set of similarly-situated persons" (here, the discrete group of "individuals or entities who have paid to advertise on Google's services"). ECF No. 86 at 7–8. Any benefit to the public from Plaintiff's proposed claims "would be derivative of and ancillary to the benefit to [search advertisers]." *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018). The addition of a conclusory note that Plaintiff seeks relief under the UCL individually and on behalf of the public

[5] This Court previously considered whether an amendment would be futile in view of a potential Cartwright Act claim, *see* ECF No. 86 at 7–8, but its reasoning generally applies with equal force to Plaintiff's proposed claims under both the doctrine of Unjust Enrichment and the UCL. Notably, despite this Court's explanation that "no court has interpreted the Cartwright Act (*or any other law other than the UCL, CLRA, and FAL*) to authorize . . . public injunctive relief," *see* ECF No. 86 at 7 (emphasis added), Plaintiff still seeks to add claims under the Cartwright Act and for Unjust Enrichment specifically for purposes of seeking such relief, *see* Mot. 4, 8.

"as a whole" rather than "as a class action or as a representative action," PSAC ¶ 169, does nothing to change that fact. Ultimately, Plaintiff's "prayers for monetary relief [remain at] the heart of [its] claims" and, therefore, its request for public injunctive relief—and attempt to invoke the *McGill* rule—fail. *See Johnson v. JP Morgan Chase Bank, N.A.*, 2018 WL 4726042, at *7 (C.D. Cal. Sept. 18, 2018).

2. Plaintiff's Proposed State Law Claims Are All Independently Defective

Even aside from the Court's prior observations as to the futility of Plaintiff's requests for public injunctive relief, which apply with equal force to the amendments Plaintiff now proposes, *see supra* Section III.C.1 & n.4, Plaintiff's proposed claims under the Cartwright Act, the UCL, and the doctrine of Unjust Enrichment are independently deficient and would be dismissed.

Cartwright Act. Plaintiff's Cartwright Act claim must be dismissed for the same reasons as Plaintiff's Sherman Act claim because "the requirements for a claim under California's Cartwright Act are identical to those for a claim under the Sherman Act." *See e.g., Colonial Med. Grp., Inc. v. Cath. Health Care W.*, 444 F. App'x 937, 939 (9th Cir. 2011) (unpublished); *see also Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1131 & n.5 (9th Cir. 2015); *Cisco Sys., Inc. v. Dexon Computer, Inc.*, 2021 WL 5848080, at *5 (N.D. Cal. Dec. 9, 2021).

UCL. Plaintiff's UCL claim fares no better. "[T]he UCL creates three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent." *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012) (internal quotation marks omitted). Plaintiff appears to seek relief under each of the three UCL prongs,[6] PSAC ¶¶ 174–77, but none is satisfied. To the extent Plaintiff premises its UCL claim on "unlawful acts," the claim is predicated on Plaintiff's Sherman and Cartwright Act claims and must be dismissed for the same reasons as those claims. *Parducci v. Overland Sols., Inc.*, 399 F. Supp. 3d 969, 982 (N.D. Cal. 2019). To the extent Plaintiff premises its UCL claim on "unfair acts," the claim also falls for the same reasons as its

[6] On a less generous reading of the PSAC, Plaintiff's UCL claim appears to include only an "unlawful" claim. The PSAC alleges that Defendants violated the UCL by "violating Sections 1 and 2 of the Sherman Act" and the Cartwright Act. PSAC ¶¶ 174. Likewise, Plaintiff's Motion for Leave to Amend references only supposedly "unlawful" conduct, Mot. 2, 6–7, and does not mention "fraudulent" or "unfair" conduct. *Cf. Wilson*, 668 F.3d at 1140 (deeming allegations under the "unfair" and "fraudulent" prongs waived where "opening brief only discusse[d] unlawful prong").

antitrust claims, *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1124 (9th Cir. 2018) ("[T]he determination that [] conduct is not an unreasonable restraint of trade necessarily implies that [it] is not 'unfair' towards consumers." (internal quotation marks omitted)), and because it necessarily overlaps "completely with [Plaintiff's flawed] claim under the [unlawful] prong," *Parducci*, 399 F. Supp. 3d at 982 ("[W]here the unfair business practices alleged under the unfair prong of the UCL overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL, the unfair prong of the UCL cannot survive if the claims under the other two prongs of the UCL do not survive."); *see also Coffee v. Google, LLC*, 2022 WL 94986, at *13 (N.D. Cal. Jan. 10, 2022); *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1104–05 (N.D. Cal. 2017).[7] Finally, to the extent Plaintiff advances a "fraudulent acts" UCL claim, Plaintiff does not plead fraud with the requisite degree of particularity under Federal Rule of Civil Procedure 9(b). *Parducci*, 399 F. Supp. 3d at 982; *see also Grant v. Pensco Tr. Co., LLC*, 2014 WL 1471054, at *6 (N.D. Cal. Apr. 15, 2014).

Unjust Enrichment. Plaintiff's claim for Unjust Enrichment also cannot survive. Although "there is no[] . . . cause of action for unjust enrichment" under California law, courts sometimes construe a purported unjust enrichment claim "as a quasi-contract claim seeking restitution." *Ketayi v. Health Enrollment Grp.*, 516 F. Supp. 3d 1092, 1139 (S.D. Cal. 2021) (internal quotation marks omitted). They will only do so, however, in circumstances involving "mistake, fraud, coercion, or request," *see id.* (internal quotation marks omitted), and in which restitution is the only adequate remedy available, *see Barrett v. Optimum Nutrition*, 2022 WL 2035959, at *6 (C.D. Cal. Jan. 12, 2022). Plaintiff's Unjust Enrichment claim ignores these requirements and instead relies on its (flawed) antitrust claims to allege that Defendants were unjustly enriched "[a]s a result of their unlawful conduct," PSAC ¶ 187, which is insufficient for several reasons.

[7] Even if the PSAC could be read to include a non-overlapping "unfair" claim, it still does not properly allege one. Plaintiff "fails to state a claim under the [] 'unfair' prong because [it] does not plead . . . that [Defendants] violated some public policy or that any harm to [it] outweighs the utility of [Defendants'] conduct." *Hodges v. Apple Inc.*, 2013 WL 4393545, at *5 (N.D. Cal. Aug. 12, 2013); *see also Victor v. R.C. Bigelow, Inc.*, 2014 WL 1028881, at *18 (N.D. Cal. Mar. 14, 2014) (holding plaintiff failed to state a claim under either of the prevailing tests of establishing an "unfair" prong violation). Moreover, while Plaintiff seeks disgorgement under the UCL, it cannot secure "restitution for past harm under the UCL" because it does not allege—and cannot establish—that it "lacks an adequate remedy at law," particularly given that it squarely seeks damages to compensate for its alleged harm. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020).

First, "Plaintiff does not allege any quasi-contract between the parties" sufficient for this court to infer a quasi-contract claim in the first instance. *Swift Harvest USA, LLC v. Boley Int'l HK Ltd*, 2020 WL 7380148, at *16 (C.D. Cal. Sept. 22, 2020). *Second*, Plaintiff's conclusory allegations are insufficient to "plausibly plead[] an actionable wrong" because the PSAC does not allege any mistake, fraud, coercion, or request—let alone "with [the] particularity" required by Rule 9(b). *Hammerling v. Google LLC*, 2022 WL 2812188, at *17 (N.D. Cal. July 18, 2022); *Dairy, LLC v. Milk Moovement, Inc.*, 2022 WL 2392622, at *8 (E.D. Cal. July 1, 2022) (dismissing claim that "incorporate[d] by reference all of [plaintiff's] other allegations and allege[d] in conclusory terms that [defendant was] unjustly enriched"); *Souter v. Edgewell Pers. Care Co.*, 2022 WL 485000, at *12 (S.D. Cal. Feb. 16, 2022). Indeed, "[b]ecause [Plaintiff's] other causes of action did not state a claim, [its Unjust Enrichment] claim also [necessarily] fails." *Avakian v. Wells Fargo Bank, N.A.*, 827 F. App'x 765, 766 (9th Cir. 2020) (unpublished); *Vallarta v. United Airlines, Inc.*, 497 F. Supp. 3d 790, 810 (N.D. Cal. 2020) (Gilliam, J.) (dismissing unjust enrichment claim premised on UCL claim); *see also Pistacchio v. Apple Inc.*, 2021 WL 949422, at *3 (N.D. Cal. Mar. 11, 2021) ("[A] bald conclusory allegation of supracompetitive prices fails to satisfy pleading requirements [for an unjust enrichment claim]."). And *third*, Plaintiff does not "adequately plead[]" that restitution is the only adequate remedy available at law to address the harm it alleges, *Barrett v. Apple Inc.*, 523 F. Supp. 3d 1132, 1157 (N.D. Cal. 2021); on the contrary, Plaintiff expressly seeks monetary damages for the same conduct for which it seeks restitution. *Optimum Nutrition*, 2022 WL 2035959, at *6. Thus, Plaintiff's Unjust Enrichment claim should be dismissed.

3. This Court May Decline to Exercise Supplemental Jurisdiction Over Plaintiff's UCL and Unjust Enrichment Claims

If this Court dismisses Plaintiff's Sherman Act and Cartwright Act claims, it may "decline supplemental jurisdiction over [Plaintiff's other] state law claim[s]." *Pimentel v. Aloise*, 2018 WL 6025613, at *23 (N.D. Cal. Nov. 16, 2018). Courts typically decline to exercise supplemental jurisdiction over pendent state law claims where they have dismissed all claims over which they had original jurisdiction. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (explaining that the balance of factors leans against exercising jurisdiction over remaining state law

claims). The PSAC invokes the Court's subject-matter jurisdiction for its Sherman Act claims, the Court's diversity jurisdiction under the Class Action Fairness Act ("CAFA") for its Cartwright Act claim, and the Court's supplemental jurisdiction for its remaining state law claims. PSAC ¶¶ 1–3, 47. Dismissal of Plaintiff's Sherman Act claims would divest this Court of subject-matter jurisdiction, and dismissal of Plaintiff's Cartwright Act claim would divest this Court of jurisdiction under CAFA. *See Marquez v. DSW Shoe Warehouse, Inc.*, 2021 WL 6200337, at *1 (N.D. Cal. Mar. 12, 2021) (agreeing "that dismissal of class claims divests the district court of CAFA jurisdiction" and "declin[ing] to exercise supplemental jurisdiction").[8] Thus, if the Court dismisses Plaintiff's Sherman Act and Clayton Act claims, it may choose not to "exercise supplemental jurisdiction over [Plaintiff's remaining] state law claims." *See Schutza v. Zulkoski*, 2014 WL 5092875, at *3 (S.D. Cal. Oct. 9, 2014). For all these reasons, Plaintiff's PSAC would be futile, and this factor weighs heavily in favor of denying leave.

D. Plaintiff Already Had One Prior Opportunity for Amendment

Denial of leave to amend is further warranted because Plaintiff already amended its complaint. Plaintiff filed the FAC shortly after Defendants filed their original Motion to Dismiss and the Google Defendants filed their Motion to Compel Arbitration, i.e., after having seen all of Defendants' arguments on these motions. Despite that preview of Defendants' arguments, the FAC's principal change from Plaintiff's original complaint was a relabeling of Plaintiff's requests for disgorgement and divestiture as so-called requests for "public injunctive relief" as a means to address the Google Defendants' Motion to Compel Arbitration; the FAC barely even attempted to cure any of the substantive problems with its Sherman Act claims that Defendants pointed out and did not raise any state law claims. Months after Plaintiff filed the FAC, Plaintiff conceded to this Court that it could have advanced the state law claims it now seeks to add at the dawn of this litigation. *S.F. Herring Ass'n*, 946 F.3d at 582 (noting that "discretion to deny leave to amend is particularly broad where the plaintiff has previously amended the complaint" and where "the facts and the theory have been known to the party seeking amendment since the inception of the cause of action" (internal

[8] Notably, Plaintiff's PSAC does not invoke this Court's general diversity jurisdiction and, in fact, concedes that the parties do not have complete diversity sufficient to maintain diversity jurisdiction over Plaintiff's UCL and Unjust Enrichment claims under 28 U.S.C. § 1332(a). PSAC ¶¶ 50–52.

quotation marks omitted)). "Because Plaintiff has already had an opportunity to amend his complaint in response to a motion to dismiss filed by Defendant[s], this factor also weighs in favor of denying Plaintiff leave to amend . . . ." *Utterkar*, 2015 WL 5027986, at *8.

E. The Record Supports a Reasonable Inference of Bad Faith or Dilatory Motive

Finally, denial of leave to amend is warranted because the record also calls into question whether Plaintiff acted with bad faith or dilatory motive in seeking leave to file the proposed amendments at this stage. Courts may find bad faith or dilatory motive where a plaintiff "merely is seeking to prolong the litigation by adding new but baseless legal theories," *Cabrera v. Residential Credit Sol. Inc.*, 2015 WL 13916231, at *7 (C.D. Cal. Sept. 10, 2015) (quoting *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 881 (9th Cir. 1999)), or where a plaintiff brings a motion for leave to amend for tactical reasons, such as where a Plaintiff's "true purpose" in seeking amendment is "to prevent a ruling on [a] pending motion to dismiss," *see Franczak*, 2013 WL 4764327, at *4.

The record here supports a reasonable inference that Plaintiff's motive in seeking leave to amend was both tactical and designed to prolong the litigation. Plaintiff seeks to add multiple new legal theories that, for the reasons discussed above, are without merit. It does so by advancing a faulty request for public injunctive relief that encompasses billions of dollars of disgorgement and divestiture. It does so on facts known to it for at least nine months, without addressing any deficiencies previously identified by Defendants, and "with no explanation for [its] delay in asserting th[ese] new theor[ies]" despite previously amending its complaint. *Millbrooke v. City of Canby*, 2014 WL 715480, at *4 (D. Or. Feb. 24, 2014); *see also Horton v. Vinson*, 2015 WL 4774276, at *29 (N.D. W. Va. Aug. 12, 2015) (finding bad faith where plaintiff "clearly knew of" new allegations when it filed amended complaint and sought "to avoid pleading standards by repeatedly amending his complaint after the opposing party point[ed] out flaws in motions practice"). And it does so after the Court sent this case against the Google Defendants to arbitration and already suggested that amendment to add state law claims with a request for public injunctive relief would be futile, *cf. Hernandez v. DMSI Staffing, LLC*, 79 F. Supp. 3d 1054, 1059 (N.D. Cal. 2015) (denying motion designed "to avoid the possibility of an adverse ruling on [] motion to compel arbitration"), and a mere three weeks before oral argument on the Apple Defendants' Motion to Dismiss the FAC was

initially scheduled, *see Franczak*, 2013 WL 4764327, at *4. Meanwhile, Plaintiff has named Defendants' senior-most executives individually and pressed for their depositions at the earliest possible stage. *Cf. Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012) (noting "such discovery create[s] tremendous potential for abuse or harassment" (internal quotation marks omitted)).

In the aggregate, the circumstances suggest that by its Motion, Plaintiff seeks merely to "reinvigorate [its] case, gain [artificial] settlement leverage against Defendants, or create further delay in the case." *Millbrooke*, 2014 WL 715480, at *4. This factor, too, supports denying leave.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for Leave to Amend. Plaintiff's Motion only provides further reason for this Court to grant Defendant's pending Motion to Dismiss the FAC and to dismiss Plaintiff's Complaint with prejudice.

DATED: September 23, 2022

By: /s/ *Steven C. Sunshine*

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SIGNATURE ATTESTATION

Pursuant to Civil L.R. 5-1(h)(3), I hereby attest that I have obtained the concurrence in the filing of this document from all the signatories for whom a signature is indicated by a "conformed" signature (/s/) within this e-filed document, and I have on file records to support this concurrence for subsequent production for the Court if so ordered or for inspection upon request.

DATED: September 23, 2022 By: /s/ *Steven C. Sunshine*